

## **Presentation by the Ombudsman for Children to the Joint Committee on Child Protection**

**10 October 2006**

Mr Chairman, members of the Committee, let me start by thanking you for the invitation to meet with you today. I know that you are working to a tight time frame and I appreciate the complexity of the issues you are working through over the coming weeks. As such, I appreciate the opportunity for an open exchange of views with you here today. I hope that our discussions and the consideration of my written submission to the Committee and my Advice to Government on the Criminal Law (Sexual Offences) Bill, 2006, will be of assistance to you in your important work.<sup>1</sup>

The orders of reference of this Committee are very widely drawn. Today, I propose to focus on a number of key issues which specifically relate to the protection and status of children and which are centrally relevant to the mandate of my Office.

The Ombudsman for Children Act, 2002, provides that I shall monitor and review generally the operation of legislation affecting children and provide advice on any matter relating to the rights and welfare of children, including the probable effect of legislation on children. I also have a role to encourage the development of policies, practices and procedures to promote the rights of children. It is in the context of this mandate that I will frame my remarks today.

As the Committee knows, my Office is in direct contact with children and young people, families and a range of professionals involved in work with children and

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<sup>1</sup> Ombudsman for Children, Submission to the Joint Committee on Child Protection, 30 August, 2006.

Advice of the Ombudsman for Children in relation to the Criminal Law (Sexual Offences) Bill, 2006. This advice is appended to my written Submission to the Committee at appendix 1.

we have a mandate to highlight issues of concern to children and young people in Ireland today.

I understand that the Committee is assisted by legal advisors and has met with experts in criminal law in relation to the finer legal points raised by the CC case and the Criminal Law (Sexual Offences) Act, 2006. So I will not go over this ground again in detail, but will confine myself to pointing up a number of specific issues in relation to the new Act.

Today, I would like to focus on the following matters of direct relevance to the Committee's terms of reference:

- the legal status of children in Ireland;
- the protection of children involved in court proceedings under the 2006 Act;
- issues of concern with regard to the 2006 Act; and
- the age of consent.

The establishment of this Committee presents a real opportunity to make progress with regard to the status of the child as an individual rights holder. Earlier this year there was disappointment at the recommendations of the All Party Oireachtas Committee on the Constitution which fell short of the recommendations of the Constitution Review Group in 1996. I was therefore heartened by the support for real Constitutional change expressed by the Cabinet level members of this Committee at its first meeting in July. Adding to this momentum was the commitment expressed by the Minister for Children to progress the status of children as individual rights holders at the examination of Ireland's report to the UN Committee on the Rights of the Child in Geneva three weeks ago. The Minister spoke about work on an audit of the Constitution, through the lens of the Convention on the Rights of the Child, and was positive about the possibilities for change.

The UN Committee's Concluding Observations on Ireland's Second Report to the Committee were published two weeks ago. In its Observations, the UN Committee expressed regret at the lack of progress relating to the status of the child as a rights-holder and urged the State to make every effort to accelerate the implementation of the recommendations of the Constitution Review Group of 1996.

I understand that the Seanad will discuss the UN Committee's Observations tomorrow and hope that this will mark the beginning of a process to follow-up and implement the recommendations of the UN Committee.

The case for Constitutional change is clear. The Constitution Review Group has called for it, the UN has called for it and the public reaction to the outcome of the CC case has indicated a desire to place the protection of children at the very heart of our legal system. It is my view, as set out in my submission to the All Party Oireachtas Committee on the Constitution of January 2005, that a general express provision relating to children's rights should be inserted into the Constitution. This remains my view today.

The lack of Constitutional recognition has had real consequences for children, as a quick review of some of the leading Supreme Court cases on this point clearly demonstrates. In the absence of an express provision for the rights of the child, the judiciary are confined to acting within the provisions of a Constitution which affords a higher status to the family.

A key consideration here is that children do require special protection. This is why we have a UN Convention on the Rights of the Child, the terms of which Ireland has signed up to and is under an obligation to comply with. We need to achieve an appropriate balance between competing rights in our society. In doing so, we need to recognise that there is no level playing field between children and adults who may seek to do them harm.

From the very top, that is, from the Constitution down, there must be a recognition that children are individual rights holders and that their best interests must be considered as a primary consideration in matters concerning them. This will then enable and encourage the Oireachtas, policy makers and practitioners to incorporate the “best interests” principle, which is at the heart of the UN Convention on the Rights of the Child, into their work without fear of falling foul of the Constitution.

Turning now to the protection of children involved in Court proceedings under the Criminal Law (Sexual Offences) Act 2006, I consider that the inclusion of express rights in the Constitution would accommodate the introduction of special measures to protect children involved in court proceedings. Without this recognition, I fear that such special measures may be subject to challenge as to their constitutionality.

In my written Submission to the Committee and in my Advice on the Criminal Law (Sexual Offences) Bill, 2006, I expressed concern that the Act left open the possibility that child witnesses may be required to attend trial and may be subject to cross examination. Many, including members of the Government, also expressed concern at this prospect.

My Submission to the Committee sets out a range of measures which should be introduced in order to protect child witnesses and prevent their appearance in Court. These include:

- the presentation of video evidence;
- limitations on cross examination;
- the presence of intermediaries to support a child;
- clarity around the duty to protect children in Court room; and
- the introduction of pre-trial measures and training.

There are good examples of the introduction of such measures in other common law jurisdictions, as described in my written Submission, and I would encourage the Committee to review international best practice in this field. I would urge the Committee to support the introduction of these protection measures.

I would like to turn now to the concerns I have in relation to the provisions of the 2006 Act. These concerns have already been set out in my Advice to Government on the Bill and in my written Submission to the Committee.

I have three main concerns regarding the provisions of the Act. These are: the potential criminalisation of young people in respect of consensual sexual behaviour; the discrimination against boys; and the failure to incorporate the “best interests” principle into the Act.

Firstly, under the current terms of the 2006 Act, young people can be prosecuted for engaging in consensual sexual activity under the age of consent.

It is my view that, in principle young people should not be criminalised in respect of consensual behaviour amongst themselves. The key element here is consent. Where there is actual consent, criminal proceedings should not be brought. This entails that those professionals charged with determining whether there was consent be trained in working with children in relation to such matters.

Secondly, I do not consider that there are reasonable grounds for the provision which grants immunity to girls in respect of sexual intercourse and which thereby discriminates against boys. Tackling the stigmatisation which may attach to teenage pregnancies would be better achieved by the removal of the criminal law from the sphere of consensual sex between young people and by awareness raising measures.

Thirdly, in my Advice on the Bill, I recommended that the “best interest of the child” principle be incorporated into Section 3 of the Act which concerns the discretion of the DPP to bring prosecutions against children aged 15 – 17. As I have already stated, in principle, I consider that children should not be prosecuted for engaging in consensual behaviour amongst themselves. However, in the event that a prosecution is brought against a young person it should be at the consent of the DPP. I would urge the Committee to recommend that the discretion of the DPP be extended to children of all ages (and not just the 15-17 year age group as is currently the case). I further consider that the DPP should exercise this discretion in accordance with the best interests principle enshrined in the UN Convention on the Rights of the Child and that the rationale for his decisions should be made public. Such a move by the DPP would very helpful in developing our understanding of the complex issues involved in such cases.

In summary, the enactment of the 2006 Act presented a missed opportunity to indirectly incorporate the key principles of the best interests of the child, non-discrimination and respect for the voice of the child, as set out in the UN Convention on the Rights of the Child. This may largely have been due to the fact that time was of the essence for the drafting and enactment of the Act and there was not sufficient time to give consideration to these matters. At the meeting of the UN Committee on the Rights of the Child in Geneva three weeks ago, the UN Committee encouraged the State to avail of all opportunities to indirectly incorporate the Convention through primary legislation. I do hope this Committee will now take the opportunity to consider the provisions 2006 Act in the light of the UN Convention on the Rights of the Child and make recommendations for change to bring the Act into compliance with the provisions of the UN Convention.

Turning now to the issue of the age of consent, an issue which I know this Committee has kept under consideration over the past few months. I believe that this is a matter we must consult children and young people on and I welcome the decision of the Minister for Children to undertake a consultation

with children and young people on this issue. Although this may be a challenging topic for participation work, there is now a wealth of information on best practice in relation to participation exercises, standards and guidelines on how to conduct quality participation work with children and young people. I also consider that consultation work on this issue should include other constituency groups who are closely connected with the reality of the lives of children in Ireland.

Finally, stepping back from the confines of the 2006 Act and the immediate implications of the CC case, it is clear that together, as a society, we must do much more to prepare our children and young people for life in Ireland today.

We must ensure that relationships and sexuality education and awareness raising activities are delivered to all of our young people so that they may avoid the health risks and other difficulties attached to early sexual activity. There are recognised gaps in the provision of such education within the school setting and outside of it. In recognition of this, the UN Committee on the Rights of the Child, in its Concluding Observations on Ireland, called for enhanced access to adolescent-specific reproductive and sexual health information and services.

In conclusion, the work of this Committee presents an opportunity to enhance the protection of children in Ireland by recommending change in the following areas: Constitutional protection for the rights of all children; the protection of children involved in Court proceedings; and a renewed focus on the need for education, awareness raising and participation exercises with children and young people.

I remain, as always, at the disposal of the Committee should I be in a position to assist it in any further way in its continuing work. I hope that there will be an opportunity to discuss the matters raised in my written submission with the Committee here today and, again, I thank you for the opportunity to meet with you.